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Current Topics.

Blackstone in the United States.

NOT only is it interesting but extremely gratifying to note that our American confrères show an extraordinary interest in all that recalls BLACKSTONE and his labours to make the law for the first time really readable. Quite recently in connection with the Philadelphia Bar Association at an exhibition in that city a special feature was made of engraved portraits of the great legist, of his letters and of the manuscript notes he made for the second book of the Commentaries. In addition there was shown the author's patent of precedence as well as his commission as a judge of the King's Bench. We are almost tempted to grudge these personal relics being absent from England where they might be expected to be, but in view of the very real enthusiasm for BLACKSTONE in America and that which he achieved in his brilliant conspectus of the Law of England, which was to be that also of the United States, we are content that these memorials of the commentator should be in the keeping of our transatlantic relations who, like ourselves, are the inheritors of the common law so admirably set forth in BLACKSTONE'S great work.

War Risks Insurance: Commodities.

IT was recently stated in *The Times* that the Board of Trade War Risks Insurance Scheme for commodities is not so well understood as it might be, and that the Board of Trade wishes to appeal to policy-holders to assist in expediting the settlement of claims. Policy-holders, it is urged, can assist by seeing that claims are made in proper form without delay and that in all correspondence, whether with insurance companies or with the Board, adequate and accurate details are given. It appears that many claims are based on the selling, instead of the cost, prices, and that the published list of exempted goods is often overlooked. Another mistaken view, which seems to be prevalent among traders, is that when insured goods have been damaged the policy-holder must wait until an assessor appears before taking such salvage measures as the removal of goods to a place of safety. It is the duty of the policy-holder to take steps at once to prevent further damage or loss, and if he is unable to obtain the necessary material he should apply for assistance to the local authority. Reasonable expenses incurred in removing goods to a place of safety will be allowed without assessment beforehand. A policy-holder must, as soon as he is aware that loss or damage has occurred, inform the insurance company or Lloyd's, acting as the Board of Trade's agents, who will report the case to the insurance official of the division. There are twelve of these divisions in the country, and the said officials are experienced men who have been lent to the Government by the leading insurance companies for the work. The duty of informing the insurance official of damage to goods in public warehouses rests with the wharfingers, but, in order to expedite procedure, the Board of Trade has now provided that the insurance official shall act immediately on any information which comes to him from any source and shall instruct an assessor to take all possible steps on the spot to avoid further damage. It is recognised that unavoidable delay in presenting claims may be caused by such circumstances as the destruction of stock records, or may be due to the buildings being inaccessible because of the presence of unexploded bombs, or to other dangers arising from damage to the structure. Where it appears that a period of delay is likely to be inevitable, arrangements have been sanctioned by the Board of Trade for substantial payments in advance of final settlement. The foregoing notes may be of assistance to practitioners called upon to advise traders in circumstances of this nature.

Solicitors and the Control of Maps Order.

READERS will recall that under the Control of Maps Orders, 1940, no person other than certain officials may acquire any map of any part of the United Kingdom and the Isle of Man drawn to a scale exceeding one mile to one inch except under authority of a licence granted by the Secretary of State or a chief officer of police. Moreover, no person may "sell" any such map to another person except upon production of a licence authorising him to acquire it, and the sale must be endorsed by the vendor upon the licence, and he must transmit it to the Secretary of State or chief officer of police by whom it was granted. The expression "sell" includes "distribute, dispose of and part with possession of." (A licence authorising the acquisition of more than one map need not be forwarded until all maps authorised by it have been acquired by the holder.) The October issue of *The Law Society's Gazette* states that the council of The Law Society has made representations to the Home Secretary pointing out the necessity for solicitors to purchase large scale maps in connection with their profession, notably in conveyancing matters and running-down cases, and has urged that a general licence might be granted to members of the solicitors' branch of the legal profession exempting them from the provisions of the order so far as concerns acts performed in the practice of their profession. Our contemporary states that the Home Office has informed the council that the order need not be applied in the case of plans acquired or disposed of by solicitors in connection with the sale, transfer, mortgage or other dealings with land with which they are concerned professionally. It is further stated that if any solicitor frequently requires to purchase maps, as opposed to plans, for professional purposes, and desires a general licence for that purpose, he should apply to the chief officer of police for the district in which he resides or, in London, to the divisional superintendent. We desire to express our acknowledgments to our contemporary for the above information.

War Damage to Realty.

A CORRESPONDENT asks us to inform him of the legal basis for the various vague statements made by Government spokesmen on the subject of compensation for war damage to realty as dealt with in the Weir Report. We regret that we are unable to point to any such legal basis, presumably because there is none. So far as we can discover the matter has been left to a general undertaking that something will probably be done after the war. Nearly two months ago the Prime Minister indicated that better arrangements would be made on the basis of compulsory insurance, and four weeks ago he said that the Treasury had a bill almost ready. Since

then no more has been heard. Three weeks may be a very short time *sub specie æternitatis* or in Whitehall. It is not so to the homeless victim waiting to know whether he can count on getting adequate compensation reasonably soon. On the other hand, it is usually too much to expect him to formulate his claim in its final shape within thirty days, as the words in italics at the head of form V.O.W.1 require, unless the Inland Revenue grant a special dispensation. In existing circumstances everyone concerned should realise that there is no legal authority for this period of limitation. The English have traditionally been more careless of their lives than of their property, and this whole matter will grow into a major political and social issue unless it is dealt with by statute in clear terms, at an early date, on lines which commend themselves to the moral feeling of the community, viz., that war damage in its entirety is a charge on the whole community, and that it must be assessed liberally and paid without delay.

Profiteering in Houses.

ANOTHER matter in which the Government's inactivity threatens to cause serious unrest and consequent injury to the war effort is its failure to secure that fresh homes are available for the middle-class homeless at reasonable prices. At present it is very difficult to obtain any accommodation at all in areas within easy reach of London, except for the rich and for those who are cared for by the billeting authorities. Owners of medium-sized houses are taking advantage of the shortage to ask unduly high rents. Since it is the general conviction that the suffering from air-raid damage should be spread over the community, it follows that the homeless must be provided with accommodation approximating to what they have lost at no greater cost. One possible step would be for the Government to set up forthwith a Rent Regulation Committee on the lines of the committee for regulating the prices of goods presided over by Mr. RAYMOND EVERSHED, K.C. It would be well, too, if one or more of the newspapers with large circulations took the matter up with a view to bringing home their social responsibilities to owners and estate agents. But legislation is required urgently, as the existing Rent Restrictions Acts hardly touch the fringe of the trouble.

Compensation for Requisitioned Premises: Rent.

A POINT under the Compensation (Defence) Act, 1939, was recently raised in the House of Commons by Rear Admiral BEAMISH, who asked the Financial Secretary to the Treasury whether his attention had been drawn to the many ambiguities contained in the Act, and the injustice inflicted on tenants and landlords by many of its provisions, particularly to the absence of specific reference to premises which were let at a fixed rent, which the Government had taken over, and for which they did not pay the full rent to the lessee; and whether it was the intention of the Government to rectify that inequitable treatment. In reply, Captain CROOKSHANK said that he was unable to accept the contention. The Act provided that the rent payable for requisitioned premises should be the sum equal to the rent which might be payable by a tenant in occupation of the premises, during the period for which possession of the premises was retained, under a lease granted immediately before that period. In a few cases the rent might be less, but in many cases might also be more than the rent which was actually being paid at the date of the requisition, but the basis laid down by the Act seemed in principle to be reasonable. It was, of course, the case that the amount of the rent which was in fact paid was an element to be taken into account in assessing the compensation rent. Captain CROOKSHANK concluded by observing that any ambiguities arising on the interpretation of the Act, if they could not be settled by agreement, might be referred to the independent tribunal constituted under the Act.

Damaged Houses: Cost of Repairs.

THE Ministry of Health recently contradicted a statement made in some quarters to the effect that it had sent a circular to local authorities stating that householders whose property required first-aid repairs might give instructions to a private builder for the work to be done, and that the cost would be met by the local authority. The position, it is said, is that the owner will be responsible for the cost of repairs to his house unless arrangements with the builder have been made by, or with the previous approval of, the local authority, in which event the cost will form a charge on the property and no payment from the owner will be called for until after the war. Unless, therefore, an owner is prepared to meet the cost of repairs himself, he should consult the local authority before taking action.

Furniture in Damaged Houses.

THE Minister of Home Security, who was recently invited to give a ruling on the salving of furniture in houses bombed by the enemy, stated that, while the primary responsibility for recovering and protecting removable goods and articles from a damaged building rested with the owner, local authorities had been invited to render such assistance as might be possible for the removal and local transport of goods or articles, or for their protection against loss or further damage, particularly where persons had been rendered homeless. He stated that some local authorities had already acquired premises for storing the furniture of homeless people or absentee owners who could not be traced. Additional transport had been purchased by some local authorities to speed up the salvage of furniture, and the question how far and in what ways assistance could be extended was being urgently examined. It is pointed out, however, that with so much else of equal importance on their hands the authorities in heavily raided areas cannot always keep pace with the demand for these facilities, and that it is therefore incumbent on all property owners who are in a position to help themselves to relieve the strain upon the limited resources available by so doing.

Water Supply.

A CIRCULAR (No. 2172) which has recently been sent from the Ministry of Health to local authorities concerned and to medical officers of health emphasises the need of taking proper precautions during repairs to water mains against risks of pollution of the supply. It appears that the occurrence at the same time of a fracture in a water main and a sewer in close proximity or in the same crater does not in itself constitute an immediate and direct danger to the former inasmuch as the sewer is usually below the level of the main, and the main is under pressure. Moreover, when the pressure has fallen off, the water has already ceased to be delivered to consumers. But there is a definite risk of pollution when a repaired section of the main is again brought into use. The circular points out that it is quite possible, and indeed probable, that the damaged section of the main between the closed valves will have become polluted in the intervening period, and the authorities concerned are urged to take the appropriate measures. It is stated that the Minister would not have deemed it necessary to address himself specially to water undertakers on the subject but for the fact that his inspectors have reported one or two instances where the necessary precautions were being carried out in what seemed to be a somewhat perfunctory manner. The proper measures of sterilisation should, it is urged, be adopted in all cases of fractured water mains, even if there is no apparent risk of pollution of any kind. The circular goes on to deal with the position if, notwithstanding all precautions, there is reason to suppose that the supply may have become unsafe, or if the damage to mains is so intensive and the interruption of supply so serious that consumers are likely to resort to casual water from rivers, streams, ponds, etc. In such cases consumers in the areas concerned should be warned to boil all water for drinking or culinary use until further notice. If boiling is impossible, e.g., because of the interruption of the gas supply, the use of chlorinated soda solution is suggested. Ten drops of the solution, obtainable from any chemist, should, it is stated, be added to one pint of water, and the mixture stirred, shaken or allowed to stand for five minutes, one crystal of ordinary photographic hypo then being added to remove the taste of chlorine. For other purposes, such as washing salads or fruits, a proportion of not less than one teaspoonful of the solution to a gallon of water is recommended. It appears that this solution is not very stable and will not keep indefinitely.

The Land Registry.

WE understand that considerable inconvenience is caused to solicitors by the fact that the Land Registry was recently so damaged by enemy action that it has had to suspend operations. It is believed that it will, before very long, be reopened elsewhere, and that its registers are intact. In the meantime no searches or registrations are possible either in the Land Registry itself or in the Charges Register. It is devoutly to be hoped that expert consultations will rapidly be held to determine what legislative steps are necessary to deal justly with the effects of this hiatus, and we may express the fainter hope that this lesson in the trials caused by centralisation will not be lost on those responsible. In the meantime there are certain obvious difficulties for the practitioner. If completion of a purchase of registered or of unregistered land falls due during the hiatus, it will be

impossible to make the usual and necessary searches for charges. To some extent this difficulty can be met by exacting from the vendor a statutory declaration that no act or thing has been done or has occurred to increase the charges registered at the date of the search made before contract; or, if there was no such search, those disclosed in the contract. So far as regards land which is to be the subject-matter of a conveyance involving the duty of registering the title, whether or not for the first time, it would seem best merely to complete (subject to the declaration mentioned above) and to postpone registration. But whatever procedure is followed, much will, of course, depend on the circumstances, especially that of the faith reposed by the purchaser's solicitors in those of the vendor.

Recent Decisions.

In *Rex* v. *Garbett* (*The Times*, 22nd October) the Court of Criminal Appeal (LORD CALDECOTE, C.J., and HAWKE and HUMPHREYS, JJ.) quashed the appellant's conviction at Swansea Assizes of sedition on the ground that the learned judge (MACNAGHTEN, J.) did not sufficiently define "sedition" to the jury.

In *Kite* v. *Brown* (*The Times*, 31st October) a Divisional Court (LORD CALDECOTE, C.J., and HAWKE and HUMPHREYS, JJ.) upheld a decision of justices to the effect that where a tradesman had sold a quantity of rationed food to three different purchasers each of whom was the holder of a general ration book but none of whom was registered with the tradesman, and where the same had sold the food in question to those three persons without receiving a coupon in exchange, six separate offences had been committed under reg. 55 of the Defence Regulations, 1939, art. 2 of the Rationing Order, 1939, and the Emergency Powers (Defence) Act, 1939. In the case of the sale to one of the purchasers the charges were selling two different articles of food to a person who was not registered with the appellant and without the delivery up of a coupon, and the court held, further, that the informations relating to that matter were not bad for duplicity inasmuch as the offence under art. 2 of the Rationing Order was of having sold rationed food not in accordance with the provisions of the Order.

In *R. Hoe & Co., Ltd.* v. *Dirs* (*The Times*, 1st November) the Court of Appeal (Sir WILFRID GREENE, M.R., and CLAUSON and GODDARD, L.JJ.) upheld the decision of a county court judge to the effect that in considering whether "suitable" work within the meaning of s. 9 (3) of the Workmen's Compensation Act, 1925, was available to a workman, one of whose eyes had been rendered useless by an accident, it was necessary to take into account the risk of injury to the other eye, and that the work of a fitter was not suitable in consequence.

In *Grantham* v. *New Zealand Shipping Co., Ltd.* (*The Times*, 1st November), LEWIS, J., awarded a stevedore damages against his employers in respect of personal injuries sustained in the course of his employment, on the ground that the defendants had not provided a safe system of working.

In *Taylor* v. *West* (*The Times*, 2nd November) the Court of Appeal (Sir WILFRID GREENE, M.R., and CLAUSON and GODDARD, L.JJ.) reversed the decision of a county court and held that a landlord who had obtained a certificate from a county agricultural committee to the effect that a cottage was required for the occupation of a farm worker necessary for the working of his farm was entitled to possession of the cottage (see 1st Sched. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933). There was no power to go behind the said certificate (*Smith* v. *Primavesi* [1921] W.N. 291), and the deputy County Court Judge ought to have exercised his discretion in favour of the plaintiff.

In *Moscrop* v. *London Passenger Transport Board* (*The Times*, 5th November) the Court of Appeal (SCOTT, CLAUSON and LUXMOORE, L.JJ.) allowed the appeal of a motor-omnibus driver employed by the respondents from a decision of MORTON, J., and held that a condition in regard to representation by an official of the Transport Union imposed as part of the terms of employment of the respondents' employees implied that no employee unless he were a member of the Transport Union should be entitled to be represented at the hearing of an appeal by any person, and that such condition was void by virtue of s. 6 (1) of the Trade Disputes and Trade Union Act, 1927, which prohibits a public authority from imposing a condition whereby employees not members of a trade union are liable to be placed under any disability or disadvantage as compared with other employees. The condition provided: "Drivers and conductors appearing before a divisional superintendent or on appeal may be accompanied by an official of the union."

Criminal Law and Practice.

Employers and the Offence of Terminating an Employment.

IN a previous note (*ante*, p. 603) I mentioned a case in which it was held, on the clear construction of the Civil Defence (Employment) Order, 1940 (No. 1206), that it was a criminal offence for an A.R.P. worker in the continuous and whole-time employment of a local authority to give notice terminating his employment. This offence is restricted to members of rescue parties, first-aid parties and stretcher parties in such employment. It is interesting to be reminded by a recent prosecution before the Huddersfield stipendiary magistrate that there is another regulation which makes it an offence for any class of employer to terminate his servant's employment in certain circumstances (*The Times*, 29th October, 1940).

That regulation is No. 2 in the National Service (Armed Forces) (Prevention of Evasion) Regulations, 1939 (No. 1099), and it provides: "(1) An employer shall not terminate the employment of any person employed by him (*a*)—by reason of any duties or liabilities which that person is or may become liable to perform or discharge by virtue of the provisions of the Act, or (*b*) in order to evade the obligations imposed by subsection (1) of section 14 of the Act." The maximum penalty on summary conviction of an offence against the regulations is a fine of £50.

The facts in the cases before the Huddersfield stipendiary magistrate were that three conscientious objectors who had been dismissed from their employment brought summonses under the regulation against their former employer. The magistrate dismissed the summonses, saying that no man was bound to employ another of whose opinions and conduct he disapproved. It was not illegal to dismiss him provided that proper notice was given. The magistrate decided that reg. 2 was *ultra vires*, and that he could not convict the society under it.

The Act under which the regulations were made is the National Service (Armed Forces) Act, 1939. The duties and liabilities which an employee may become liable to perform or discharge under the Act are (1) liability to be called up for service in the armed forces of the Crown (s. 1); (2) to furnish to the specified authority any required particulars about himself (s. 2 (1) (*a*) and S.R. & O., 1939, No. 1120); (3) to make application to be registered (s. 2 (1) (*b*)); (4) to produce the certificate of registration to a constable in uniform on request (s. 2 (7)); (5) to notify the Minister of any change of name or address after registration; (6) to submit to medical examination on notice being served (s. 3); (7) to present himself for entry for service in the forces on the day and at the place specified in a further notice (s. 4 (1)).

The obligations of the employer which are mentioned in the regulations are those under s. 14 (1). Where an employee is called up for service connected with the present emergency the employer's duty is to reinstate him in his employment at the termination of that service in an occupation and under conditions not less favourable to him than those which would have been applicable to him had he not been called up. Subject to certain defences specified in the proviso to the subsection, an employer failing to comply is liable on summary conviction to a fine not exceeding £50, and the court may order him to pay to the person whom he has failed to reinstate a sum not exceeding an amount equal to twelve weeks' remuneration at the rate at which remuneration was last payable.

In the cases at Huddersfield it appears that it was suggested by the prosecution that the employees were dismissed, not for the purpose of the employer evading his duty under s. 14 (1), but by reason of duties or liabilities which the employees were or might become liable to discharge by reason of the provisions of the Act. It is clear from the terms of s. 5 of the Act, which deals with conscientious objectors, that such persons may well be subject to most of the duties and liabilities set out in the Act, including actual presentation for entry for service in the Forces. Quite apart, however, from any question of the validity or otherwise of reg. 2, it is a question of fact whether the employer has properly terminated a person's employment on notice for permissible, though possibly not praiseworthy, reasons, such as political or moral opinions, or because of the possible liabilities of the employee under the Act. Even though a person's opinions may be disclosed for the first time only as a result of his performance of his obligations or his liability to performance under the Act, it might well be argued that the employer's dismissal on account of his conscientious objections was due to a sincere objection to his opinions, and not to any obligation of the employee under the Act. If, as appears from the report, the Huddersfield stipendiary magistrate found as a fact that the dismissals were solely

on account of the conscientious objections of his employees it would seem to be a perversion of language to say that the dismissals were due to obligations of the employees under the Act. In any case there is no obligation under the Act upon any person to register as a conscientious objector, this being merely a right. The obligation is simply to register.

In view of this, it is difficult to understand from the necessarily abbreviated newspaper report of the case why the learned magistrate should have thought it necessary to find that the regulation itself was *ultra vires*. It does not purport to deal with conscientious objectors as such. If, on the other hand, it is *ultra vires*, it could not have been necessary to decide the difficult question as to why the employer terminated the employments. The words of reg. 2 follow word for word the power given to the Minister in s. 14 (5) of the National Service (Armed Forces) Act, 1939, to make regulations, and it would, therefore, be difficult to argue that the regulation is *ultra vires*. It may be that the view of the learned magistrate was that in view of the manifest object of the Act, the regulation is *ultra vires* if and in so far as it protects conscientious objectors from dismissal on the ground that the employer objects to conscientious objections as such. This, it is submitted, would be reading into the regulation much more than it either contains or was intended to contain.

Police Interrogations and Searches.

Strong statements are not infrequently made from the bench on the increase in the number of confessions alleged to have been made to the police (see *per* Cave, J., in *Reg.* v. *Thompson* [1893] 2 Q.B. 35). More recently the recorder of Liverpool publicly expressed the opinion that these confessions were increasing, and ought in the interests of justice to be diminished (*ante*, p. 35).

A method by which defendants to criminal charges may be safeguarded against doubtful evidence of alleged confessions was recently indicated by the stipendiary magistrate at Clerkenwell (*R.* v. *Gair and Alexander*, *The Times*, 31st October), when two men were charged with assaulting detectives of the London and North Eastern Railway police. The defendants were employed at King's Cross goods depot. One of them, it was alleged, objected to being questioned by one of the detectives about a parcel he had in his pocket and struck the officer. The other detective approached and asked the defendant to go into a police box, whereupon the second defendant followed, saying: "If you are going to search him, I am going to be a witness. He insisted on staying although ordered away. It was stated in evidence that the chief of the railway company's police had given definite instructions that no other person was allowed to be present when a crime was being investigated or a person searched. The magistrate dismissed the charges, and held that a person about to be questioned or searched by police officers had a right to have a friend present.

If justice is to be manifestly seen to be done, to quote Lord Hewart's well-known *dictum*, there is every reason why a person under such circumstances should have a friend present. All sorts of abuses of the rights and liberties of the subject might otherwise be possible. In *R.* v. *Cowell* (1940), 84 Sol. J. 334, it was held that a prisoner's evidence was admissible as to whether a statement had been obtained voluntarily or not, and there is every reason why, at a critical stage when evidence is being sought, he should have the opportunity of providing himself with independent evidence. Furthermore, the police have, apart from statute, only a limited right of search, i.e., where the evidence of a prisoner gives rise to a reasonable suspicion that he has about him weapons with which he might do violence to others (*Leigh* v. *Cole* (1853), 6 Cox C.C. 329), or if it is suspected that there is material evidence on his person. There is no reason why the police should object to the presence of an independent witness at a search, as such a person can only be of assistance towards its proper conduct. If, in fact, instructions to the contrary have been given by any chief of police, they can only have been given under a misapprehension as to the true legal position.

War Damage and a Mortgagee's Security.

Under normal circumstances one of the most satisfactory forms of security that a lender of money could obtain was a mortgage giving him rights over land and buildings thereon, since these could be regarded as being of a very permanent nature. In order to be able to realise his security the mortgagee had various rights over the land. He could, for instance, sell the land, though he had to exercise his power of sale in the manner prescribed by s. 103 of L.P.A., 1925. He could also realise his security by foreclosure. However, at the present time the position is somewhat different since buildings are very liable to suffer war damage. In order to deal with some of the hardships which will arise as a result of this war damage to real property the Landlord and Tenant (War Damage) Act, 1939 [2 & 3 Geo. 6, c. 72] was passed. A secondary effect of this Act is its effect on the value of a mortgagee's security.

In s. 24 of the Act two important definitions are to be found. "War damage" is defined as damage caused by, or in repelling, enemy action, or by measures taken to avoid the spreading of the consequences of the damage so caused. "Unfit" is given two meanings depending on whether it relates, in the main, to buildings or works or whether it relates to land. In the first case, which includes the case of land more than three-quarters of the value of which is attributable to buildings or works, unfit means unfit for the purpose for which the buildings or works were used or adapted for use immediately before the damage occurred. In the second case, unfit means unfit for any purpose for which the tenant can reasonably be expected to use the land.

Now it is very common for a mortgage deed to contain a covenant by the mortgagor that he will keep the mortgaged premises in repair, for otherwise the mortgagee's security would be greatly prejudiced. Such obligations to repair are dealt with by s. 1 of the Act, of which subs. (1) renders it no longer obligatory to repair or make good any war damage. Further, if the war damage makes it impracticable, or of no substantial advantage to the person entitled to the benefit of the obligation, to carry out other repairs, then by s. 1 (2) the carrying out of these other repairs shall be suspended until the war damage has been repaired. When the obligation to repair has been extinguished, as in the case of war damage, any rights of the mortgagee arising from the breach of this covenant, such as those of sale or foreclosure, are also extinguished by virtue of s. 1 (3). The interests of the mortgagee, are, however, protected to some extent by s. 2 of the Act. This section reads into the mortgage a covenant by the mortgagor that, when war damage occurs, he will as soon thereafter, as is practicable, serve upon the mortgagee a notice stating that damage has occurred as well as its general nature. He is also under an obligation to permit the mortgagee, his servants or agents, to enter at reasonable times to inspect the damage, and if he wishes, to repair it either permanently or temporarily. But it shall not be lawful, except with the leave of the court, for a mortgagee to enforce any right arising out of a breach of this implied covenant. Most of the cases of enforcing such rights would be covered by the Courts (Emergency Powers) Act, 1939, quite apart from this section. That Act, however, would not apply to a sale by a mortgagee in possession, either personally or by a receiver, on the 2nd September, 1939. In such a case s. 2 of the Landlord and Tenant (War Damage) Act, would come into operation and prevent the sale without the leave of the court.

In the case of leasehold property a still more serious position arises from the point of view of the mortgagee. By virtue of s. 4 of the Act, a tenant or lessee may, if the land be rendered unfit for use by reason of war damage, serve upon the landlord or owner a notice to disclaim the lease. True, the landlord may serve a counter-notice to avoid disclaimer requiring the tenant or lessee to retain the lease upon terms. But cases will certainly arise where this will not be done and the lease is disclaimed. The effect of such a disclaimer, as set out in s. 8 of the Act, is that at the end of the prescribed period, which is in general one month, the disclaimer will act retrospectively as a surrender of the lease. Further, by subs. (2) (*b*) of this section all sub-leases derived out of the term created by the lease in question shall also be deemed to have been surrendered, and a mortgage term is nothing more than this. There is, however, an exception to this general rule, when by the sub-lease a person is entitled to actual occupation of the land and no notice of disclaimer has been served in respect of that sub-lease. If, therefore, the mortgagee has entered into possession either personally or by a receiver, it would seem that his mortgage term would not be deemed to be surrendered unless he has served a notice of disclaimer. By reading s. 4 in the light of s. 24—the interpretation section—a sub-lessee has just the same power to disclaim his sub-term as has the lessee himself. Again, s. 8 (2) (*c*) will apply when the mortgage does not grant a sub-term of years to the mortgagee, for by it all interests in the term created by the lease in question are deemed to have been extinguished. When a notice of disclaimer is given certain particulars have to be included in it and these are set out in s. 7 of the Act. This requirement should prove to be greatly to the benefit of the mortgagee. According to s. 7 (1) (*c*), when a term of years has been mortgaged, and for the purpose of this section a mortgage is taken to include a charge or debenture, the notice of disclaimer is to include the fact that a mortgage exists, and also the name and address of the mortgagee or his successor in title. Just as the landlord is in this way made aware of the mortgage, so

by subs. (2) the mortgagee is made aware of an intended disclaimer of the lease. This subsection requires the tenant, i.e., the mortgagor, to serve a notice upon the mortgagee, within seven days from the service of the notice of disclaimer, stating the fact of disclaimer as well as the name and address of the landlord. The wording of the subsection is such that similar notices must be served upon second mortgagees. The court has power under s. 9 of the Act to modify the effect of notices of disclaimer. Applications to the court for an exercise of this power may be made according to s. 9 (3) (*a*) by any person having an interest in or derived out of the term of years created by the disclaimed lease. Thus, such an application may be made by a mortgagee. The application must be made within the prescribed period of one month. Modifications which the court has power to make in favour of a mortgagee are contained in s. 9 (1) (*b*) and s. 9 (1) (*c*) of the Act. Under s. 9 (1) (*b*) the court may except from surrender or extinguishment any sub-lease or interest, which would otherwise be deemed to be surrendered or extinguished, upon such terms as the court thinks fit. Sub-leases or interests saved in this manner may, under s. 9 (1) (*c*), be vested in any person having an interest therein, again upon such terms as the court thinks just. If the person who is required under s. 7 to serve the notice upon the mortgagee, so that the mortgagee may take advantage of an application to the court, fails so to do and the mortgagee is thereby damnified, that person is liable under s. 7 (4) to make good the damage so suffered by the mortgagee.

The court which is to administer this Act is, according to s. 23 (1), the county court, though this is subject to the provisions of s. 111 of the County Courts Act, 1934. Thus, an action must be started in the county court, but may be removed by *certiorari* to the High Court in cases which are considered by the High Court to warrant this.

A Conveyancer's Diary.

Trustees for Sale Buying Land.

A RATHER important point has been raised concerning my recent articles upon the purchase of land by trustees. It will be remembered that I stated my view that if a given set of trustees start their career as trustees for sale of land, they have thereafter power to re-invest such of their trust fund as represents the proceeds of sale of land in the purchase of other land in fee simple or in leaseholds with at least sixty years to run. The authority under which they can do so is Law of Property Act, s. 28 (1), which provides that "trustees for sale shall, in relation to land . . . and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925; . . . and (subject to any express trust to the contrary) all capital money arising under the said powers shall, unless paid or applied for any purpose authorised by the Settled Land Act, 1925, be applicable as if the money represented proceeds of sale arising under the trust for sale." This subsection clearly confers on trustees for sale, among other things, the power of Settled Land Act trustees under s. 73 (1) (xi) of that Act to invest in the sorts of land already mentioned. I am, however, asked to discuss what may be done in a case where a settlor gives land to trustees upon trust to sell or to invest the proceeds in securities authorised by the Trustee Act, 1925, *and in no other mode of investment whatsoever*. On the face of it, such a provision would mean what it says, and would preclude investment in land in fee simple or for a term of years, since those investments are not authorised by the Trustee Act. But I do not think that this simple view is correct. It is true that the powers conferred by the *Trustee* Act can be excluded by express provision, since s. 69 (2) enacts that: "The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, or have effect subject to the terms of that instrument." Thus, one may effectively say "I direct my trustees to invest only in wasting assets and ordinary shares in speculative enterprises, and in no circumstances to acquire any investment authorised by the Trustee Act, 1925," since the powers given in the fasciculus "Investments" of the Trustee Act are not expressed to apply despite a contrary intention expressed in the settlement. But s. 69 (2) is in terms confined to powers conferred by the Trustee Act, and cannot affect the case of powers conferred by s. 28 (or any other section) of the Law of Property Act. Conversely, as every practitioner knows, s. 106 of the Settled Land Act makes void any and every provision which purports to abridge the powers conferred by the Settled Land Act. The policies underlying those two Acts are quite different from one another. The Settled Land Act seeks to strike away the shackles of "land in fetters"; hence it gives numerous powers, validates all additional powers conferred by the instrument (s. 109) and makes void any attempt to curtail the statutory powers. Naturally, the powers which it primarily seeks to protect from abridgement are those which facilitate the free disposal and development of settled land, but in the omnibus provision of s. 106 it sweeps in all the other powers of the Act as well. The Trustee Act seeks to consolidate various enactments giving powers to and defining the position of trustees. This Act has no ulterior policy, except to make trusts work smoothly, and seeks only to provide what is to occur where the instrument creating the trust is silent. Hence, if the instrument speaks, the Trustee Act gives place.

There is nothing in the Law of Property Act to correspond with either Trustee Act, s. 69 (2), or Settled Land Act, s. 106, so far as trustees for sale of land are concerned. The Act proceeds quite differently, since it provides in some instances, as, for example, in s. 28 (2), that its provisions are to be *subject* to any provision of the settlement, while on the other hand, where the context makes it apt to say so, it expressly says that certain provisions (e.g., s. 26 (1) and s. 27 (2)) are to override the instrument creating the trust. There is nothing in s. 28 (1) which expressly deals with the case of conflict with the settlement; but I think that it is implied that those powers are to apply despite a contrary direction. In the first place, if a statutory power is conferred, especially with the use of the mandatory word "shall," and there is nothing express to curtail it, one would expect it, on general principles, to be paramount. Secondly, there is no context requiring the overriding effect to be express; s. 28 (1), which is an omnibus enabling provision, is not on all fours with s. 27 (2), which deals with one point upon which it nullifies a certain sort of express provision. Thirdly, s. 28 (1) expresses the same policy as the Settled Land Act: the object is to give as wide powers to deal with land settled by way of trust for sale as are given in respect of land settled in a strict settlement. It therefore incorporates all the enabling provisions of the Settled Land Act, and by incorporating them must, by necessary implication, be expected to incorporate also the provision under which they are irreducible. The main object, to be sure, is to make easy the disposal and development of land held on trust for sale, but the provision is comprehensive enough to cover all sorts of other matters, as also does Settled Land Act, s. 106. All those points tend in the same direction, but the main one is, of course, that the powers of s. 28 (1) are statutory powers, and there is no statutory provision enabling a settlor to displace them.

Before parting with this question of trustees investing in land, it may also be desirable to refer to L.P.A., s. 26 (3). As it stood in the original Law of Property Act, 1925, this subsection read "The trustees for sale shall, so far as practicable, give effect to the wishes of persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale, or, in case of dispute, of the majority (according to the value of their combined interests) of such persons, but a purchaser shall not be concerned to see that such wishes are complied with." This eminently sensible and intelligible provision was struck out of the Act by the schedule to the Amendment Act of 1926, and another substituted. In the new subsection the first paragraph largely reprints the former subsection, save that instead of being directed to "give effect" to the wishes of the persons presently entitled, the trustees are only to "consult" them and to "give effect" to their wishes "so far as consistent with the general interest of the trust." But there is added the following paragraph, which seems to verge on nonsense: "In the case of a trust for sale, not being a trust for sale created by or in pursuance of the powers conferred by this or any other Act, this subsection shall not apply unless the contrary intention appears in the disposition creating the trust." If the trust for sale is statutory, there is to be a duty of consultation: if it is not statutory, there is only to be such a duty if the settlor expressed the wish that the beneficiaries should be left in the dark and/or flouted. If he said nothing at all, there is apparently no duty to consult. I cannot help thinking that the word "not" between "shall" and "apply" has got in by mistake, though it is in the King's Printers' copy of the 1926 Act, and in the few cases where the subsection has been discussed, no one seems to have questioned its presence. Assuming that this view is correct, s. 26 (3) crystallises a rule of common sense, that trustees should consult their beneficiaries, and gives them an implied protection in taking a course preferred by a majority in value of the adult persons presently entitled. It may be a provision useful to remember in cases where there is some conflict of opinion on investment policy, though it will be more of a help after its exact meaning has been considered by the court.

Landlord and Tenant Notebook.

Right to Support from Lessor's adjoining Premises.

WHEN a landlord lets part of his property, retaining the rest, the tenant has, by implication, a right of support. It is usually said that the landlord's obligation is limited to refraining from doing anything which will take away support; that he is not liable to keep his property in repair in order that support may continue. An examination—critical, and I hope not hypercritical—of the present state of the authorities does, I submit, warrant the suggestion that this may not be the last word on the subject.

For the sake of completeness, I commence with *Rigby* v. *Bennett* (1882), 21 Ch. D. 559 (C.A.). The parties were building tenants of the same landlord, but the case illustrates the difficulty sometimes encountered of finding the *ratio decidendi* in these authorities. The defendant, who took his lease more than a year after the commencement of the plaintiff's, set about excavating to such a depth that the foundations of the plaintiff's house were endangered. The claim asked for a declaration that the plaintiff was entitled to such support as might be necessary for the support of land and buildings, and for an injunction and damages. His argument appears to have been that the grant of the lease included a grant of what was necessary to support the main subject matter of the grant. This was hardly in issue, but the defendant invoked an implied reservation; so substantially the result depended on the inference to be drawn from facts, and there was no need to classify the cause of action. Thus Jessel, M.R., could speak, in his judgment upholding the decision in the plaintiff's favour, of "the easement or the implied obligation or warranty that the house should not be let down," etc.; it did not matter which. Cotton, L.J., was more precise, describing the plaintiff's case as resting upon "an implied obligation on the part of the grantor that he will not derogate from his own grant" and agreeing that the grant included "the right to all necessary support."

The impossibility of making a grantor liable for repairs by virtue of any implied grant was emphasised by *Jones* v. *Pritchard* [1908] 1 Ch. 630. The defendant, having purchased half a wall of a house from the plaintiff's predecessor, built a house of his own against it. The common intention was clearly that it should become a party wall. The defendant built with proper care, but his house subsided, cracks developed in the wall, a flue in the defendant's half became defective, and smoke found its way to rooms in the plaintiff's house. It was held that there were implied grants and reservations of whatever was necessary to effect the common intention, and the defendant was not entitled to do anything to defeat such intention; but, apart from negligence or want of reasonable care and precaution, neither party was subject to any liability to the other in respect of nuisance or inconvenience caused by an exercise of the rights or easements impliedly granted or reserved. Neither party might pull down his half of the wall; but the owner of the servient tenement was not bound to execute any repairs necessary to ensure the enjoyment or convenient enjoyment of the easement by the owner of the dominant tenement.

This case has been considered to support the proposition that a landlord is not liable by implication to keep his own property in repair so as to safeguard neighbouring premises he has let. Part of the judgment might, perhaps, have been expressed with greater precision; but, taking it as a whole, one must read the "apart from negligence or want of reasonable care and precaution" as limited to positive acts, though the well-known definition of "negligence" recognises omission as well as commission, and "want of precaution" *prima facie* would cover failure to make a stitch in time, as it were.

However, recognising the hopelessness of endeavouring to found a positive duty upon an obligation *not* to derogate, let us turn to cases between landlord and tenant in which implied covenant, or other implied covenants, could be invoked.

Most in point is *Colebeck* v. *Girdlers Co.* (1876), 1 Q.B.D. 234, which came before the court by way of a case stated. The plaintiff held, of the defendants, a repairing lease of a house of somewhat peculiar shape; the ground floor adjoined an archway, but the first floor extended above the arch, and its boundary was a party wall dividing it from the next house, which also belonged to the defendants. A split and a bulge developed in the wall dividing the plaintiff's premises from the archway, and as a consequence other walls became defective and the house useless. The claim was for damages for failure to perform an "obligation to maintain a wall supporting the plaintiff's house." The argument was that this obligation was founded on implied covenant, and the fact that the plaintiff was himself bound to repair his part of the building was relied on to create the necessary implication; but the only authority which was cited was an *obiter dictum* of Twysden, J., in *Pomfret* v. *Ricroft* (1669), 1 Saund. 322: "if a man demise by deed a middle room in a house and afterwards will not repair the roof, whereby the lessee cannot enjoy the middle room, an action of covenant lies for him against the lessor." But Mellor, J., after commenting on the paucity of authority, held that, while the defendants' failure to repair might be an answer to a claim by them on the repairing covenants, there was no obligation upon them, either by implied covenant or grant, to support and maintain their wall.

If this decision is still good law, it makes no difference whether a tenant talks about derogation from grant or implied covenant. But what I am about to suggest is that, by giving the implied covenant a name, it may be possible to improve the status of Twysden, J.'s *dictum*.

Now if we examine the more recent history of the implied covenant for *quiet enjoyment*, I think we will find that certain developments which are in point have taken place. One is the extending of its scope, at one time supposed to be limited to disturbance of possession, to disturbance of enjoyment. The other is the inclusion of an omission to repair within its purview.

The first of these changes occurred imperceptibly, but became an accomplished fact when Fry, L.J., delivering the judgment of the court in *Sanderson* v. *Mayor of Berwick-on-Tweed* (1884), 13 Q.B.D. 547 (C.A.), said: "... where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land nor the possession of the land may be otherwise affected." This was accepted by Lindley, L.J., in *Robinson* v. *Kilvert* (1889), 41 Ch. D. 89 (C.A.), though, as the learned lord justice remarked, the doctrine was in advance of the older authorities.

The other extension was foreshadowed by *obiter dicta* uttered by Brett, L.J., and Cotton, L.J., in *Anderson* v. *Oppenheimer* (1880), 5 Q.B.D. 602 (C.A.) (burst pipe, jury negatived negligence), the former saying: "there was no act of either commission *or omission* and no negligence," the latter, "I agree that an act of omission may be tantamount to an act of commission so as to be a breach of the covenant"; and by a similar *dictum* of Vaughan Williams, L.J., in *Cohen* v. *Tannar* [1900] 2 Q.B. 609 (C.A.) (mesne tenant consented to judgment for possession though good defence available): "There may, no doubt, be a breach of the covenant by an act of omission, but it must be the omission of some duty, and there was no duty cast upon the defendant of defending the action after he had given notice to the plaintiff of the pendency of the action ..." (i.e., when the plaintiff could have been let in to defend). Then, in *Booth* v. *Thomas* [1926] Ch. 397 (C.A.), the principle was actually applied when a tenant sued for damage to a Salvation Army hall occasioned by the bursting of a culvert on retained adjacent land. The culvert had, the defendant's surveyor admitted, "practically come to its ultimate end ... by reason of the wear and tear," and strenuous arguments against applying the covenant to mere omissions were rejected.

I suggest, then, that if the plaintiff in *Colebeck* v. *Girdlers Co.* had framed his action by reference to *the* covenant for quiet enjoyment instead of making breach of "*an* obligation to maintain a wall supporting the plaintiff's house," his cause of action, the result might have been different; and that that decision is no longer authority for the proposition that a landlord is not in such circumstances liable to keep his property in repair.

Our County Court Letter.

The Possession of Mortgaged Land.

IN *Worcestershire Permanent Money Society* v. *Suffield and Wife*, recently heard at Redditch County Court, the claim was for possession of a dwelling-house and for £94 18s. 1d. arrears of rent and £17 10s. mesne profits. The plaintiffs' case was that the defendant, having purchased the freehold, had given a first mortgage for £650 to a third party and a second mortgage for £150 to the plaintiffs. In October, 1932, there were arrears under the second mortgage, and the plaintiffs accordingly paid off the first mortgagee and took a transfer of his mortgage. Two days later, viz., on the 21st October, the defendant entered into a tenancy agreement, under which he became the plaintiffs' tenant at a rent of 25s. a week, subject to a week's notice. On the 26th October, 1932, a rent book was sent, and the total liability for rent, to the date of the plaint, was £498 15s. 5d. The amount paid was only £403 16s. 4d., and, in view of the arrears of £94 18s. 1d., the defendant was given notice to quit on the 3rd June, 1940. The last payment of rent was in November, 1939, and the plaintiffs, being desirous of exercising their power of sale, required vacant possession in order to obtain a better price.

Having been in possession, under the tenancy agreement, since 1932, the plaintiffs contended that they were not affected by the Courts (Emergency Powers) Act, 1939, by virtue of proviso (*a*) to s. 1 (2) thereof. The case for the defendant was that he had been in uninterrupted possession of the premises for eighteen years, and had not given the plaintiffs even symbolic possession, e.g., by delivering up the key for any period. The plaintiffs had never in fact been in possession, and the tenancy agreement was a mere fiction. The plaintiffs were not landlords, but mortgagees, and the tenancy agreement was an agreement collateral to the mortgage within the meaning of the Courts (Emergency Powers) Amendment Act, 1940, s. 3 (4). The plaintiffs' right to possession was therefore restricted by the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, s. 1. The claim was ostensibly by a landlord for possession, but it had appeared that the proceedings were for the enforcement of a charge, where the amount owing in respect of the charge exceeded £500. Under the County Courts Act, 1934, s. 52 (1) (*c*), the court accordingly had no jurisdiction. The defendant was not estopped by his signature of the tenancy agreement, as the latter contained no recital that the mortgagees were in possession. The mortgage and the tenancy agreement comprised one transaction, and the court could not enforce the latter to the exclusion of the former. His Honour Judge Kennedy, K.C., held that the plaintiffs, in effect, were claiming possession of land under a mortgage for a sum of money (viz., £909) beyond the jurisdiction of the court. It was impossible to disregard the fact that the tenancy agreement was made when the plaintiffs were not in possession. The defendant had tacitly admitted that the plaintiffs were landlords, but in fact they were not and never had been landlords. The claim was therefore misconceived, and judgment was given for the defendant, without costs.

It is to be noted that the Courts (Emergency Powers) Amendment Act, 1940, s. 3 (4), also restricts the right of a mortgagee to obtain possession of land by virtue of an attornment clause. The latter was a device for enabling mortgagees to obtain possession as landlords, by means of a specially indorsed writ and the default procedure under Ord. XIV in the High Court. In the county court they were equally entitled to apply for possession under the County Courts Act, 1934, s. 48 (1). The effect of the emergency legislation is to abrogate attornment clauses and any procedure based thereon.

Motorists and Straying Horses.

In a recent case at Kington County Court (*Davies* v. *Price*) the claim was for £15 and the counter-claim was for £19, both being for damages for negligence. The plaintiff's case was that at 10.15 p.m., on the 30th September, 1939, he had been driving his car on the road at a speed of about 12 to 13 miles per hour. Opposite the entrance to a garage, a horse had leapt on to the car bonnet, and had afterwards got up and galloped away. It was impossible to see the horse standing in the gateway; had the horse been in the road the accident could have been avoided. The defendant's case was that the horse had been put into a paddock, around which the fence was sound and a yard high. A horse had never escaped from the paddock before, and the gateway, from which the horse was alleged to have sprung, was recessed for 6 feet. Besides the veterinary fees, the defendant had incurred loss by reason of the horse's depreciation in value. His Honour Judge Roope-Reeve, K.C., dismissed the claim and counter-claim, with costs. Compare *Deen* v. *Davies* [1935] 2 K.B. 282, in which a motorist recovered damages in respect of injuries caused by the escape of a horse from a stable in a town.

Title to Hayrick.

In *Byrne and John Inns, Ltd.* v. *Whitlock*, recently heard at Northampton County Court, the claim was for damages for the conversion of a rick of hay. The plaintiffs' case was that the rick was on land upon which a smallholder had pastured dairy cows from 1928 to 1935. Owing to an outbreak of disease, the herd was given up, and a crop of hay was grown on the field. The hay was stacked in a rick, and late in 1935 the smallholder gave up the tenancy. The defendant then took over the land, but refused to buy the hayrick, which was sold to the plaintiffs (in January, 1938) for £13. The defendant refused to allow its removal, and the price of hay had since risen, but the plaintiffs were not claiming the delivery up of that particular rick, which had deteriorated in quality. The defendant's case was that, in 1937, he had agreed to buy the rick at a price per ton to be settled by the valuer. The title to the rick had thereupon passed to the defendant, and the smallholder had no right to sell it to the plaintiffs. His Honour Judge Hurst held that there was no sale of, or intention to sell, the rick to the defendant. Judgment was given for the plaintiffs for £41, with costs.

Practice Notes.

Service of Writ upon Enemy Firm.

By Ord. XLVIIIA, r. 3, where persons are sued as partners in the firm name under r. 1, the writ must be served either upon one or more of the partners, or at the principal place, within the jurisdiction, of the business of the firm upon any person in control or management of the business at the time of service.

In *Meyer* v. *Louis Dreyfus et Cie* (1940), 4 All E.R. 157, M sued Louis Dreyfus et Cie, whose head office was in Paris, but who had a branch in London. On 15th June, 1940, Paris became territory in enemy occupation. M, accordingly, served the manager of the London branch, who entered a conditional appearance. The manager thereupon moved to set aside the writ, saying that the partners, having become alien enemies, had ceased to carry on business in England, and that the authority of the London manager had automatically gone. The business, however, was still being carried on in England. The action was to recover part of the plaintiff's salary which he, employed by the firm for many years, had been in the habit of leaving with the firm. The London branch had two managers, R and G. R died in 1939, and G became the sole manager under a very wide power of attorney under which he appointed S, as substitute. The plaintiff issued his writ on 22nd June, and on 28th June served it upon G. On 4th July conditional appearance was entered on behalf of the four partners. On 5th July G died. On 11th July the firm applied to have the writ and service set aside. The master dismissed the summons; Wrottesley, J., reversed his order. Appeal was now brought. The Board of Trade had issued a licence to G to carry on the business, but no vesting order had been made.

It was argued for the plaintiff that where the firm is carrying on business, it is unnecessary to serve the partners personally; service upon the person in control is sufficient. To enforce judgment against any of the partners the leave of the court must be obtained, and they can then put forward any individual defence. At common law, the partners, it was contended, did not become alien enemies, even though they resided in a country part of which was in enemy occupation (*Re Deutsche Bank* (*London Agency*) [1921] 2 Ch. 291). Hence the power of attorney was unaffected.

For the partners it was contended that the court must be satisfied that service upon G would be likely to be brought to the notice of the firm. When the firm became an enemy partnership, G's authority came to an end—not to be revived by the custodian (*Stevenson* (*Hugh*) *& Sons, Ltd.* v. *Akt. für Cartonnagen-Industrie* [1917] 1 K.B. 842; *Tingley* v. *Müller* [1917] 2 Ch. 144).

The Court of Appeal (MacKinnon, Goddard and du Parcq, L.JJ.) held that the service was good and that the appearance should stand as unconditional.

MacKinnon, L.J., said that since the custodian allowed G and his successors to continue the business, G had control of the business and service upon him was properly effected. The point was "a pure technicality"; a person who is, or has become, an alien enemy may be sued, subject to the difficulties of service. Under the authority of *Porter* v. *Freudenberg* [1915] 1 K.B. 857, if the defendants had been an *individual*, service of a *concurrent writ* upon G would have been good service. The alternative method under Ord. XLVIIIA applies equally, by *service upon the manager of a firm*. The machinery of the concurrent writ in this case was accordingly unnecessary.

The decision is in harmony with the reasoning in *Porter* v. *Freudenberg*, which laid down that, apart from the question of service, there was no reason why an alien enemy should not be brought before the King's courts as defendant.

Books Received.

The Law relating to Trading with the Enemy. By Arno Blum, Advocate of the Palestine Bar, Corporate Accountant, and Max Rosenbaum, LL.M., of Gray's Inn, Barrister-at-Law. With the collaboration of Herbert S. Baron, Solicitor of the Supreme Court. 1940. Demy 8vo. pp. xix and (with Index) 196. London: The Solicitors' Law Stationery Society, Ltd. Price 15s. net.

Tax Cases. Vol. XXIII. Part. II. London: H.M. Stationery Office. Price 1s. net.

Local Authorities in War-time. By W. Ivor Jennings, M.A., LL.D., of Gray's Inn, Barrister-at-Law. 1940. Medium 8vo. pp. xl and (with Index) 200. Supplement No. 1, 37 pp. London: Chas. Knight & Co. Price 15s. net.

To-day and Yesterday.

Legal Calendar.

4 November.—Even after the defeat of Prince Charlie's rising the Government had to face and combat widespread loyalty to the exiled house of Stuart. This was particularly strong among the students of Oxford University. In 1748 the Vice-Chancellor, Heads of Houses and Proctors held a meeting to consider a tumultuous demonstration that the young men had held in the public streets, "amounting to a notorious insult to His Majesty's crown and government." Measures were taken to regulate their conduct in the coffee-houses where they assembled. On the 4th November a student named Dawes was tried in the King's Bench and found guilty of uttering treasonable expressions. He was sentenced to two years' imprisonment.

5 November.—On the 5th November, 1832, Lord Eldon wrote to the Middle Temple Benchers thanking them for their acceptance of the gift of a bust of himself which he had sent them. He wrote: "If in the course of his past professional and judicial life his conduct has met with their approbation, that approbation will console him during the remains of his existence . . . He can have no claim to it founded only on that laborious and never remitted industry which may have enabled him to render the exercise of his humble talents not discreditable to that Honourable Society of which at the outset of his professional life he had the good fortune to be a member."

6 November.—Lord Ellenborough resigned the office of Chief Justice of the King's Bench on the 6th November, 1818.

7 November.—Mr. Justice Foster died on the 7th November, 1763. He had served in the Kings' Bench for eighteen years with a great reputation for steady justice in his administration of the law, as well as for learning, firmness and independence. Lord Chief Justice de Gray said of him: "He may truly be called the Magna Carta of liberty of persons as well as of fortune." He came of a legal family, his father and his grandfather having been attorneys in Marlborough, where they enjoyed the highest reputation for honourable dealing.

8 November.—The 8th November, 1661, saw Pepys in contact with the law: "This morning up early and to my Lord Chancellor's with a letter to him from my lord, and did speak with him and he did ask me whether I was son to Mr. Talbot Pepys or no (with whom he was once acquainted in the Court of Requests) and spoke to me with great respect . . . After dinner to the Wardrobe and thence . . . to the Six Clerks Office to find me a clerk there able to advise me in my business with Tom Trice . . . I went to my brother Tom's and took him with me to my coz Turner [Serjeant John Turner] at the Temple and had his opinion that I should not pay more than the principal £200 with which I was much pleased, and so home."

9 November.—On the 9th November, 1863, Adrian Knox was born in Sydney. After being educated at Harrow and Trinity College, Cambridge, and being called to the Bar at the Inner Temple, he returned to Australia and practised successfully at the Bar, becoming Chief Justice of the Commonwealth in 1919. He was sworn a member of the Privy Council in 1920 and sat several times on the Judicial Committee in 1924 and 1925. His judgments were marked by directness, clarity and a certain circumspection. In 1930 he retired on inheriting one of the richest collieries in Australia. He died in 1932.

10 November.—On the 10th November, 1913, an extraordinary trial ended at Kieff. Mendel Beiliss, a Jew, was accused of taking part in the ritual murder of a boy of twelve, and an Englishman present noted how strange it was in that great, beautiful, civilized modern city to hear a court "solemnly discussing Black Magic, Moloch, what Dion Cassius said and what Julian the Apostate did." Though critical, he observed that the prisoner appeared to be well treated and that the presiding judge was the personification of impartial courtesy, keeping the evidence to the point and favouring neither side. After an absence of one and a half hours the jury returned a verdict acquitting Beiliss, but finding that the crime was committed in the brickyard of the Jewish family which employed him. Many held the theory that the child was murdered by a criminal gang whose secrets he had discovered. The sinister figure of a woman called Vera Cheberyak, keeper of a thieves' kitchen, stood in the background of the case. The account in *The Times* of the case and its setting in the lovely city of Kieff should serve as a corrective to many current impressions of pre-Revolutionary Russia.

The Week's Personality.

In spite of deep learning and complete integrity, Lord Ellenborough was not well liked as a judge. For one thing, he was stern and austere in his administration of the law. Even in the Legislature he did all he could to maintain its severity, opposing with all his force the efforts of Sir Samuel Romilly to mitigate the brutalities of the penal code. Further, he had a bitterly sarcastic tongue which constantly used its wit to wound. It was he who, when a young counsel could get no further with his speech than "My lord, my unfortunate client," said in a soft and encouraging tone: "You may go on, sir, so far the court is quite with you." When an eminent conveyancer solemnly said: "An estate in fee simple, my lords, is the highest estate known to the law of England," the Chief Justice said gravely: "Stay, stay; let me take that down." He wrote and read slowly and emphatically: "An estate—in fee simple—is—the highest estate—known to—the law of England," adding: "Sir, the court is much indebted to you for this information." To an eminent, if sanctimonious, leader who in an address to the jury kept saying "I call Heaven to witness" and "As God is my judge," he said "Sir, I cannot allow the law to be thus violated in open court; I must proceed to fine you for profane swearing five shillings an oath." He did not spare the House of Lords and once when Lord Westmorland said during a debate "My lords, at this point I ask myself a question," Lord Ellenborough was heard to say in a loud aside: "And a damned silly answer you'll be sure to get."

Cruel Kindness.

In a recent murder trial at the Gloucester Assizes the jury, possibly moved by the pathetic circumstances of the case, returned a verdict of guilty but insane, and recommended the prisoner to mercy. Charles, J., said that the course they had taken was cruel, since the man must now be detained as a criminal lunatic. He had directed them that there was no evidence of insanity. A simple conviction would doubtless have been followed by a reprieve and a speedy release. Thus well-meaning juries go wrong from ignorance of legal practice. The late Alpers, J., of New Zealand, had a story of an infanticide case in which a sympathetic jury found a verdict of "Not guilty" against an unmarried mother. Having announced this with explosive emphasis while his companions looked as if they wanted to say "Hear, hear," the foreman added by way of special confirmation: "The jury wish to state that they don't believe the poor girl knew what she was doing when she did it." The judge, however, ruled that this converted the verdict into one of "Not guilty on the ground of insanity." So though at her trial she was perfectly sane she was detained for twelve months because a kindly jury over-acted the part. Within a year of her release she was in the dock again for a similar offence. This time she was convicted, bound over, converted by the Salvation Army, and married off by them.

Also Kind.

Sometimes juries show a certain consciousness of the undesirability of an insanity verdict, and Alpers, J., had another story about that. A coroner's jury had found a verdict of suicide in the case of a man who had died of drinking prussic acid. The company which had insured his life refused to pay, and an action was brought against it. The jury at the trial were unanimously for a verdict of suicide while of unsound mind, but the foreman said: "It doesn't matter in the least to the insurance company whether we find the deceased committed suicide while of unsound mind or died by accident. The company loses either way." "But what about the evidence?" objected a juror. "We've sworn to give a verdict according to the evidence." "Hang the evidence," replied the foreman. "Think of those two sisters of his. They won't like a verdict of insanity against their brother, especially as they've got children of their own. Why not let's be kind? It won't hurt anybody." So they found "accident."

Honours and Appointments.

It has been announced that the King has conferred a Viscounty of the United Kingdom upon Lord Hewart, lately Lord Chief Justice of England, by the name, style, and title of Viscount Hewart, of Bury in the County Palatine of Lancaster.

The Lord Chancellor has appointed Mr. C. J. P. C. Jowett, Registrar of the Yeovil, Bridport, Axminster, and Wincanton County Courts, to be the Registrar of Chard. Mr. Jowett was admitted a solicitor in 1920.

Mr. William Bingham, former Chairman of the Blackheath Bench of magistrates, entered his ninetieth year on Tuesday, 5th November.

Notes of Cases.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Levy *v.* Assicurazioni Generali.

Lord Thankerton, Lord Justice Luxmoore and Sir Philip Macdonell. 3rd June, 1940.

Insurance (fire)—Exclusion of loss due to "civil commotion"—Meaning—Burden of proof.

Appeal from a decision of the Supreme Court of Palestine.

In November, 1936, the appellant insured against loss or damage by fire with the respondent company merchandise deposited in a warehouse in Jaffa. By cl. 6 of the policy it did not "cover any loss . . . directly or indirectly . . . contributed to by . . . (2) War . . . civil commotion, insurrection . . . Any loss or damage happening during the existence of abnormal conditions . . . directly or indirectly . . . arising out of . . . any of the said occurrences shall be deemed to be . . . not covered . . . except to the extent that the insured shall prove that such loss or damage happened independently of the existence of such abnormal conditions. In any action . . . where the company alleges that by reason of the provisions of this condition any loss . . . is not covered . . . the burden of proving that such loss . . . is covered shall be upon the insured." In December, 1936, a fire occurred in the warehouse, and damage to the stock was fixed by agreement at £P1,900. The appellant then brought an action claiming that sum from the respondents, but they refused to pay, alleging that one or other of the occurrences specified in condition 6 (2) existed at the time of the fire. The District Court ruled as a preliminary point that the onus of proving the existence of one or other of the occurrences lay on the company. At the trial the company called as a witness, the only one called by either side, the Assistant District Superintendent of Police at Telaviv. The District Court ordered the company to pay the sum claimed, the basis of that decision being that the company had not discharged the onus of proving that abnormal conditions existed at the date of the fire in the area where the warehouse was situate, the court holding that the question whether the conditions were abnormal must be decided by comparing those existing at the date when the policy was issued with those existing before the 19th April, 1936, when certain Emergency Regulations under the Palestine (Defence) Order in Council, 1931, were made. The Supreme Court set aside that judgment, and the present appeal was brought. (*Cur. adv. vult.*)

Lord Justice LUXMOORE, giving the judgment of the Board, said that the District Court's ruling on the question of onus had been wrong. The onus was placed on the appellant by condition 6. As a matter of agreement between parties the onus of proof of any particular fact or of its non-existence might be placed on either party (see *Re Hooley Hill Rubber & Chemical Co.* v. *Royal Insurance Co.* [1920] 1 K.B., p. 257, per Scrutton, L.J., at p. 273). The Supreme Court did not appear to have considered whether on the evidence before the District Court it was possible to hold that any one of the specific occurrences mentioned in condition 6 (2) existed at the date of the fire. The passing of Emergency Regulations was not one of the occurrences specified in condition 6. The Supreme Court called attention to the evidence of the Assistant District Superintendent of Police in detail. No doubt, considered apart from any other occurrence, the facts stated might lead to the conclusion that the conditions in the area were abnormal at the material date, but the point was only whether the evidence established that one of the occurrences mentioned in sub-cl. (2) existed on the 14th December, 1936. Counsel for the company agreed that he could only succeed under the head "civil commotion," and argued that such a condition existed at the date of the fire. The statement in "Welford and Otter-Barry's Fire Insurance," 3rd ed., at p. 64, that "The phrase 'civil commotion' is used to indicate a stage between a riot and civil war . . ." appeared to be accurate. The proved facts in the case fell far short of those held in *Cooper* v. *The General Accident Fire and Life Assurance Corporation*, 128 L.T. 481, and *Motor Union Insurance Co., Ltd.* v. *Boggan*, 130 L.T. 588, to be sufficient to satisfy the phrase "civil commotion."

The appeal should be allowed.

COUNSEL: *Valentine Holmes; Beresford*, K.C., and *A. W. Baker Welford.*

SOLICITORS: *Stanley & Co.; Dawes & Sons.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

COURT OF APPEAL.

In re Owers; Public Trustee *v.* Death.

Greene, M.R., Clauson and Goddard, L.JJ. 21st October, 1940.

Will—Construction—Bequest of pecuniary legacy—Residuary real and personal estate held on trust for sale—Payment of legacy out of residue—"Administration expenses"—Whether legacy entirely free of estate duty—Duty attributable to realty—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 16 (1)—*Administration of Estates Act*, 1925 (15 *Geo.* 5, *c.* 23), *ss.* 2 (1); 53 (3) (*c*).

Appeal from Morton, J.

The testator, who died in 1938, bequeathed to D a legacy of £50,000, and he directed the legacy duty thereon to be borne by his residuary estate. The testator gave his residuary real and personal estate to his trustees upon the usual trusts for sale and conversion and upon trust out of the moneys arising thereby "to pay his funeral and testamentary expenses and debts and the legacies bequeathed by this my will . . . and all duties free from which any legacies or annuities may be bequeathed." He directed the distribution of the residue of his estate between certain charities. The Public Trustee took out this summons for the determination of the question whether the £50,000 legacy to D, being payable out of a mixed fund of real and personal estate, should bear the estate duty attributable to the proportion of the legacy which was payable out of the real estate. Morton, J., held that the legacy must bear the proportion of the estate duty. D, the legatee, appealed. The court (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.) dismissed the appeal.

Sir WILFRID GREENE said it was contended that *In re Spencer Cooper, Poë* v. *Spencer Cooper* [1908] 1 Ch. 130, it was no longer the law. It was decided that "a general direction to pay legacies out of a mixed fund or residue charges them rateably on the portions attributable to realty and personalty . . . So far as the legacies are payable out of the portion attributable to realty they are real estate, and must bear their own estate duty, notwithstanding a direction to pay 'testamentary expenses' out of the mixed fund." It was suggested that the words "testamentary expenses" now included estate duty on real estate as a result of the 1925 legislation. The phrase did include the estate duty on personal estate. The effect of the Administration of Estates Act, 1925, ss. 2 (1) and 53 (3) (*c*), and of the Law of Property Act, 1925, s. 16 (1) and (5), was that the personal representative was accountable to the revenue for the estate duty payable on real estate passing on the death. The incidence of that duty as regards persons beneficially interested was carefully preserved. The payment of the duty was temporary or provisional and could be recouped. The words "testamentary expenses" in the will could not be construed as including estate duty. To free legacies from that portion of the estate duty other language was necessary.

COUNSEL: *Vaisey*, K.C., and *Pennycuick* (for *A. F. M. Berkeley*, on war service); *Synn Parry*, K.C., and *Russell Gilbert; Wilfrid Hunt.*

SOLICITORS: *Merton Jones, Lewsey & Jefferies; Vandercom, Stanton and Co.*

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

In re Thornhill's Settlement.

Greene, M.R., Clauson and Goddard, L.JJ. 21st October, 1940.

Settled land—Tenant for life bankrupt—Unreasonable refusal to grant lease—Trustees authorised to exercise statutory powers—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 24.

Appeal from a decision of Bennett, J. (84 SOL. J. 537).

Under a settlement of 1906, M was tenant for life of some 3,000 acres of agricultural land in Hampshire. He had been adjudicated bankrupt in 1924 and again in 1939. For some reason he had allowed the land to go out of cultivation. Farmhouses and cottages had fallen down or become so dilapidated as to be beyond repair. Tenancies had not been renewed and squatters had taken possession of parts of the property. The whole estate had become in a deplorable condition. In the summer of 1939, one P approached the tenant for life with a view to taking a tenancy of two farms on the estate and bringing them back into cultivation. The tenant for life refused to grant a lease. In the autumn of 1939 the War Office served a requisition notice on the tenant for life in respect of part of the settled property. He failed to deal with the War Office. In these circumstances this summons was taken out by the Official Receiver, the tenant for life's trustee in bankruptcy, asking that the Public Trustee, as trustee of the settlement of 1906 for the purposes of the Settled Land Act, 1925, might be at liberty to exercise in the name and on behalf of the tenant for life the powers of a tenant for life under the Act. The application was made under s. 24 of the Settled Land Act, 1925, which provided that: "If it is shown to the satisfaction of the court that a tenant for life, who has by reason of bankruptcy . . . ceased in the opinion of the court to have a substantial interest in his estate or interest in the settled land or any part thereof, has unreasonably refused to exercise any of the powers conferred on him by this Act . . . the court may, . . . make an order authorising the trustee of the settlement, to exercise in the name and on behalf of the tenant for life under this Act any of the powers of a tenant for life under this Act, in relation to the settled land or any part thereof affected, either generally and in such manner and for such period as the court may think fit or in a particular instance . . ." Bennett, J., held that the tenant for life had unreasonably refused to exercise his powers and made the order asked for by his trustee in bankruptcy. The tenant for life appealed.

Sir WILFRID GREENE, M.R., dismissing the appeal, said that the tenant for life had endeavoured to persuade him that Bennett, J., had been wrong in the order he made. There was no ground for criticising the order. It was in the circumstances right and beneficial. Appeal dismissed.

CLAUSON and GODDARD, L.JJ., agreed.

COUNSEL: *H. Rose*, for the Official Receiver; *Rawlence*, for the Public Trustee; the appellant appeared in person.

SOLICITORS: *Farrer & Co.; Tarry, Sherlock & King.*

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

HIGH COURT—KING'S BENCH DIVISION.

Re Hogan : *Re* Unemployment Insurance Acts, 1920 to 1934 and 1935 to 1939.

Singleton, J. 17th July, 1940.

Insurance (unemployment)—Partially disabled miner receiving workmen's compensation—Employed as agent by approved society—General instructions for work—Manner of carrying out work not specified—Whether insurable.

Appeal under s. 84 of the Unemployment Insurance Act, 1935.

One, Hogan, a miner, contracted miner's mystagmus, and received compensation first at the full rate and then, being certified as fit for light work, at a reduced rate, until, in February, 1938, he accepted £120 from his employers in settlement of his claim to compensation for his partial incapacity. From 1923 Hogan had been employed as local agent by a miners' approved society. On a reference of the questions whether Hogan was in respect of that employment (*a*) an employed person within the meaning of the Unemployment Insurance Acts, and (*b*) a person to whom the Unemployment Insurance (Insurance Industry Special Scheme) Orders, 1921 to 1938, applied, the Minister of Labour and National Service decided that Hogan came within both categories from the time when he began receiving reduced compensation in respect of his partial incapacity. The present appeal was brought against that decision. The particulars of Hogan's employment by the approved society were as follows: He was appointed agent verbally by the committee of the society. He was informed of his duties and given a book of rules. He was paid 2s. if he obtained a new member for the approved society, and received small payments for collecting National Health Insurance cards. He made from 5s. to 6s. a week after deducting his expenses. He could do the work in his own time. He had each week to report the amount of money which he had paid out during the week, and, on receiving the report, the society sent him the money for the following week's benefits. He had to visit sick members. He received particular instructions from the society with regard to the payment of benefits, the records to be kept in connection with them, and his duties in connection with maternity benefit. By para. 1 of Pt. I of the First Schedule to the Act of 1935, employments within the meaning of the Act are stated to include "employment under any contract of service . . . written or oral . . . and whether the employed person is paid . . . by time or by the piece . . . or . . . without any money payment."

SINGLETON, J., said that counsel for the Minister had referred particularly to para. 8 of Pt. II of the Schedule (which specified the excepted employments) as showing that someone employed as an agent might still be within Pt. I of the Schedule if there were a contract of service. It was contended by the other side that the real question for decision was what was the true relationship between Hogan and the society; that a contract of service must exist if Hogan was to be within the schedule; and that no such contract existed on the facts. It was argued for the Minister that particularly the written instructions for the payment of benefit by agents showed that the society so kept control over the agent as to make him rather a servant. Counsel stressed the fact that if Hogan did not render a weekly return of his expenditure in time he would not receive money from the society for the next week's duties. It was further argued that the relationship was strictly personal; the agent could not appoint a deputy who was not approved by the society. He (his lordship) found it difficult to find any relationship of master and servant here. He was told what to do just as was any other agent. In *Re Roberts*, 56 T.L.R. 81, at p. 82; 84 SOL. J. 44, Branson, J., had stated as a second alternative that if A employed B to do work, but left it to him to decide how the work should be done, that was a contract for services and not a contract of service. The present case came within that alternative. While Hogan was told generally by the instructions and rules what his work was, it was left to him very largely to decide how the work should be done. The instructions given did not make this a contract of service. His lordship, having referred to *Roberts* v. *Wm. Gardner & Sons*, 21 B.W.C.C. 154, said that the Minister's decision must be reversed. Although it was unnecessary to decide it, it might be that the burden was on the person seeking to establish a case within the Act to show that there was a contract of service.

COUNSEL: *Valentine Holmes* and *W. G. H. Cook* (for *J. H. A. Sparrow*, on War Service); *Arthian Davies*.

SOLICITORS: *Bircham & Co.*; *The Solicitor, the Ministry of Health and National Service.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Reading Corporation *v.* Rudland and Another.

Hallett, J. 24th October, 1940.

Local government—Compulsory acquisition of property for road improvement—Notice to treat—Compensation to lessee agreed—Acquisition of freehold by authority—Condition in lease that determinable by three months' notice to quit if premises required for road improvement—Notice to quit under that clause given by corporation—Whether valid after compensation fixed—Lessee's claim for specific performance.

Action tried by Hallett, J.

The defendants occupied shop premises in Reading which, among others, the plaintiffs, Reading Corporation, wished to acquire for the purpose of road improvements. In August, 1937, the corporation made an order, later confirmed by the Minister of Transport, for the compulsory purchase of premises, including those of the defendants, whose lease did not expire until December, 1950. In December, 1937, the corporation served on the defendants a notice to treat for the property; in January, 1938, the defendants replied with a claim for compensation for giving up their interest in the premises; and, after negotiations, a settlement was reached for the amount of compensation to be paid. The lease provided, *inter alia*, that if the local authority at any time during the currency of the lease gave notice that they wished to acquire the premises, or adjoining premises belonging to the lessors, for the purpose of street improvements, the lessors should have the right to determine the lease by three months' notice in writing. That lease was never produced to the corporation during the negotiations for the sale of the property, nor was anyone concerned in the matter on behalf of the corporation aware of the details of the defendants' interest in the premises. On the 3rd August, 1939, the lessors surrendered their interest in the premises to the corporation subject to the defendants' interest. The corporation, having notified the defendants of the surrender, ultimately in August, 1940, gave them three months' notice to quit. The defendants having refused to vacate the premises, the corporation brought the present action claiming possession, arrears of rent and mesne profits. The defendants counter-claimed, seeking specific performance of the corporation's undertaking to take over the premises at the figure agreed by way of compensation.

HALLETT, J., said that the defendants contended, first, that the term "lessors" in the material clause of the lease did not include the corporation as successors in title to the lessors under the lease. In his opinion the clause included successors and assigns of the lessors, and therefore covered the corporation. It was then argued that, once the amount of compensation had been agreed as a result of the negotiations following the notice to treat, a valid contract to purchase the premises came into existence and the corporation lost their right to give three months' notice to terminate under the clause of the lease in question. The corporation contended that they had entered into the bargain on the basis that the defendants were entitled, as they claimed to be, to a term of fourteen years expiring in December, 1950, and on the basis that their right to such a term was subject to no such clause giving a right in the lessors to determine by three months' notice in certain circumstances as the lease in fact contained. It was argued on the corporation's behalf that the agreement was entered into under a mutual mistake of fact as to the nature of the interest to be acquired, or under a unilateral mistake induced by the defendants' misrepresentation (there was no suggestion of fraud). It was difficult to see how the defendants could have been mistaken when their own lease contained the clause in question; but there was certainly a unilateral mistake on the part of the corporation. The whole question of mistake had been reviewed by Lord Atkin in *Bell* v. *Lever Bros.* [1932] A.C. 161, at p. 217; SOL. J. . Here the question of specific performance was concerned. [His lordship referred to "Halsbury's Laws of England," 2nd ed., vol. 31, p. 432 *et seq.*, and to "Fry on Specific Performance," 6th ed., p. 780 *et seq.*] He had no doubt, on the authorities, that, where there had been even only a unilateral mistake of the character here in question induced, as here, by the conduct of the party seeking to enforce the contract, that afforded a good defence to the claim for specific performance. He said "character here in question," because, as pointed out by Lord Atkin, the character of the mistake was clearly of importance. In his (Hallett, J.'s) opinion, therefore, the claim for specific performance failed. There could be no doubt that before such a claim could succeed the plaintiff must show that he was in a position to perform his part of the bargain. Before the defendants could claim the amount of the agreed compensation they must be in a position to give that for which the compensation was to be paid. It was argued for the defendants that the compensation was agreed to be paid for whatever interest the defendants might happen to have in the premises, but that contention failed on the evidence. The defendants claimed in respect of a specific interest defined by themselves, and it was only for that interest that the corporation had agreed to pay. The defendants were clearly not in a position to give to the corporation that for which they had agreed to pay the named sum. When the three months' notice to quit expired in November, 1939, they no longer had any right to remain in possession of the premises, so that they were not in a position to dispose of that which they had contracted to sell. The claim for specific performance accordingly failed, quite apart from the question of mistake. There must be judgment for the defendants.

COUNSEL: *H. G. Robertson*; *Erskine Simes.*

SOLICITORS: *Sharpe, Pritchard & Co.*, for *The Town Clerk*, Reading; *Brown, Turner & Co.*, for *E. J. Winter*, Reading.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

McVittie *v.* Rennison.

Viscount Caldecote, C.J., Hawke and Humphreys, JJ.
28th October, 1940.

Procedure—Quarter sessions—Costs—Appeal dismissed—Ordered that appellant to pay respondent's costs to be taxed—Validity—Limitation—Costs unpaid—Complaint claiming costs to be filed within six months

—When time begins to run—Summary Jurisdiction Act, 1848 (11 & 12 *Vict., c.* 43), *s.* 11.

This was an appeal by case stated from a decision of Bolton Justices.

At a court of summary jurisdiction sitting at Bolton a complaint was preferred by the respondent, the Town Clerk of Bolton, under s. 5 (2) of the Summary Jurisdiction (Appeals) Act, 1933, s. 35 of the Summary Jurisdiction Act, 1879, and the Summary Jurisdiction Rules, 1915, against the appellant, McVittie, claiming £86 0s. 6d. as being due in the following circumstances which were proved and admitted before the justices. On the 7th May, 1938, Bolton Quarter Sessions dismissed an appeal by Mr. McVittie from a decision of Bolton Justices, and ordered him to pay the costs of the appeal. On the 31st May those costs were taxed and allowed by the Acting Clerk of the Peace at £86 0s' 6d. On the 30th May, 1939, the Divisional Court ([1939] 2 K.B. 98) discharged a rule *nisi* for *certiorari* directed against the order of quarter sessions, dismissing Mr. McVittie's appeal. On 10th November, 1939, the Court of Appeal (83 SOL. J. 923; [1940] 1 K.B. 290) dismissed an appeal from the Divisional Court's decision. The £86 0s. 6d. remained unpaid by McVittie. It was contended on his behalf that the complaint was not made within six calendar months from the time "when the matter of complaint arose," as required by s. 11 of the Summary Jurisdiction Act, 1848; that the order of the 7th May, 1938, was bad in law because it did not specify the amount of the costs in question and did not show that the court had ascertained what reasonable costs the respondent had incurred; that the appellant was not estopped by the proceedings and judgments in the High Court from challenging the validity of the order of the 7th May; and that the justices had jurisdiction to decide whether or not that order was valid, and should have dismissed the complaint. It was contended for the respondent that the date on which the matter of complaint arose and time began to run under s. 11 of the Act of 1848 was the 8th June, 1938, as the respondent was not able to take any steps to recover the amount due until that date, and that the summons issued on the 18th November, 1938, was accordingly within the period of six months specified by the section; that the order of quarter sessions of the 7th May, 1938, was valid on its merits, but that it was in any event not competent for the appellant to challenge it because it had been confirmed by the judgments of the Divisional Court and the Court of Appeal. The justices were referred to *Labalmondiere* v. *Addison* (1858), 1 El. & El. 41; *Jacomb* v. *Dodgson* (1863), 3 B. & S. 461; *Sellwood* v. *Mount* (1841), 1 Q.B. 726; and *Midland Railway Co.* v. *Edmonton Union* [1895] 1 Q.B. 357. They were of opinion that the matter of complaint could not arise until the amount of the sum due was known; that the earliest date from which the period of six months could run was therefore the 31st May, the date of the taxation, so that a summons issued on the 18th November, 1938, was in time, and that they could not question the validity of the order since it had been affirmed as good by the Court of Appeal. They therefore ordered that the appellant should pay the £86 0s. 6d. claimed. McVittie now appealed.

VISCOUNT CALDECOTE, C.J., said that the first question to be decided is whether the order for costs must specify the amount of them to enable proceedings to be taken to recover them. The point was a technical one, and was bad. The long-standing practice of making orders for costs in this form was valid. Such an order was open to no possible objection merely because the parties agreed that the quantum of the costs should be fixed by taxation later. The second contention of the appellant was that the proceedings which had been taken on the order of the 7th May, 1938, were out of time because the information was not laid within six calendar months from the time when the matter of complaint arose. The order that the appellant should pay the respondent's costs of the appeal having been made on the 7th May and the complaint not having been made until the 18th November. If, on the other hand, the matter arose on the 31st May, the date on which the taxation was completed, then the information was laid within the prescribed period. The whole question appeared to turn on the terms of the Summary Jurisdiction Act, 1848. When did the matter of the complaint arise? Clearly it arose when the taxation was completed and the sum of £86 0s. 6d. was found to be the amount due. Up to that time the appellant was not in default. When the course of the taxation was completed he became in default. The justices' decision was correct in law, and the appeal should be dismissed.

HAWKE and HUMPHREYS, JJ., agreed.

COUNSEL: *Waddy; Comyns Carr*, K.C., and *F. J. Sandbach* (for *W. G. Morris*, on War Service).

SOLICITORS: *Percy H. Barker & Co.*, Manchester; *Simmons and Simmons.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Rules and Orders.

DRAFT AND PROVISIONAL RULES.

RAILWAY.

RAILWAY AND CANAL COMMISSION.

THE RAILWAY AND CANAL COMMISSION PROVISIONAL RULES, 1940. DATED OCTOBER 25, 1940.

Correspondence.

[*The views expressed by our correspondents are not necessarily those of* THE SOLICITORS' JOURNAL.]

Judicial Patronage.

Sir,—Under "Current Topics" in the issue of THE SOLICITORS' JOURNAL of the 12th October, it is stated that the nomination of the President of the Probate, Divorce and Admiralty Division is within the patronage of the Prime Minister. How then is the letter of Sir Edward Carson (as he then was) to the Prime Minister of the 23rd January, 1923, stating that he had had a letter from the Lord Chancellor offering him the office of President of "the Admiralty and Divorce Division" explained?

The letter is set out in "The Life of Lord Carson" by Edward Marjoribanks, p. 324.

Ulverston. NICHOLAS E. BARNES.
15th October.

[It is no doubt the fact that the Lord Chancellor communicated to Sir Edward Carson the offer of the presidency of the Admiralty and Divorce Division, but it is to be noted that the Prime Minister telegraphed to Carson: "Lord Chancellor informed me of proposed offer, which I entirely approved."—ED., *Sol. J.*]

Obituary.

JUDGE H. C. S. DUMAS.

Judge H. C. S. Dumas died on Sunday, 3rd November, at the age of seventy-four. He retired last year, after serving eight years as a County Court Judge. He was educated at Winchester and Trinity Hall, Cambridge. In 1892 he was called to the Bar by the Middle Temple and built up an extensive practice in the Admiralty Court. He was appointed a County Court Judge in 1931, and joined Circuit 56 (Kent, etc.). The following year he was appointed to Circuit 34 (Uxbridge County Court). Judge Dumas was made a Bencher of his Inn in 1935. On his retirement he was presented at Westminster County Court with a number of books on architecture, a subject in which he took a great interest.

MR. H. METCALFE.

Mr. Herbert Metcalfe, Metropolitan Police Magistrate at Old Street Police Court, died on Wednesday, 30th October, at the age of fifty-three. He was called to the Bar by Gray's Inn in 1914, and joined the Northern Circuit. He was appointed Commissioner of Civil Liabilities (Metropolitan Area) in 1918, and Metropolitan Police Magistrate in 1929.

War Legislation.

(*Supplementary List, in alphabetical order, to those published week by week in* THE SOLICITORS' JOURNAL *from the 16th September, 1939, to the 2nd November, 1940.*)

STATUTORY RULES AND ORDERS, 1940.

E.P. 1864. **Acquisition of Securities** (No. 4) Order, October 26.
E.P. 1865. Acquisition of Securities (No. 5) Order, October 26.
No. 1900. **Aliens** (No. 4) Order in Council, October 24.
E.P. 1893. **Condensed Milk** (Distribution) Order, 1940. Directions, October 24, 1940.
E.P. 1894. Condensed Milk (Bulk) (Maximum Prices) Order, 1940. Amendment Order, October 26, 1940.
E.P. 1895. Condensed Milk (Canned) (Maximum Prices) Order, 1940. Amendment Order, October 26.
E.P. 1896. Condensed Milk (Milk Content) Order, October 26.
E.P. 1906. **Control of the Cotton Industry** (No. 12) Order, October 29.
E.P. 1898. **Control of Fertilisers** (No. 1) Order, 1939, Direction No. 6, October 28.
E.P. 1899. Control of Fertilisers (No. 7) Order, October 28.
E.P. 1910. **Control of Iron and Steel** (No. 13) Order, October 29.
E.P. 1902. **Control of Machine Tools** (No. 6) Order, October 28.
E.P. 1875. **Control of Paper** (No. 26) Order, October 22.
E.P. 1876. Control of Paper (No. 27) Order, October 22.
E.P. 1877. Control of Paper (No. 26) Order, 1940, Direction No. 1, October 23.
E.P. 1874. Control of Paper (No. 25) Order, October 22.
E.P. 1883. **Defence** (Summer Time) Regulations, 1939. Amendment Order in Council, October 24.
E.P. 1884. Defence (Bodies Corporate and Trade Unions) Regulations, 1940. Order in Council, October 24.
E.P. 1885. Defence (General) Regulations, 1939. Order in Council, October 24, 1940, adding Regulations 48A and 54BA, amending Regulations 23, 52 and 63B and revoking Regulation 46B of the Regulations.

No. 1887. **Export of Goods** (Control) (No. 36) Order, October 28.
No. 1888. Export of Goods (Control) (No. 37) Order, October 30.
E.P. 1873. **Fire Precautions** (Access to Premises) Order, October 19.
E.P. 1903. **Lemons** (Maximum Prices) Order, October 28.
E.P. 1872. **Lighting** (Restrictions) (Amendment) (No. 2) Order, October 23.
E.P. 1881. **Limitation of Supplies** (Miscellaneous) (No. 4) Order, October 25.
E.P. 1914. Limitation of Supplies (Miscellaneous) Order, 1940. General Licence, October 30.
No. 1909. **Local Loans.** Treasury Minute, October 28, 1940, fixing Rates of Interest on Local Loans.
E.P. 1897. **Milk** (Control) (Northern Ireland) Order, October 26.
E.P. 1912. Milk Powder (Licensing and Control) Order, October 30.
E.P. 1904. **Onions** (Maximum Prices) Order, October 28.
E.P. 1890. **Papermaking** Materials (Charges) (No. 2) Order, October 21.
E.P. 1882. **Regional Commissioners** (Restriction of Movement) Order, July 13.
E.P. 1866. **Regulation of Payments** (Canada and Newfoundland) (No. 3) Order, October 24.
E.P. 1867. Regulation of Payments (U.S.A., etc.) (No. 3) Order, October 24.
E.P. 1868. Regulation of Payments (Greece) (No. 2) Order, October 24.
No. 1889. **Secretary of State's Service** (War Injuries) Rules (Burma), October 10.
E.P. 1863. **Securities** (Restrictions and Returns) (No. 3) Order, October 26.
No. 1886. **Trade Boards** (Flax and Hemp Trade, Great Britain) (Constitution and Proceedings) Regulations, October 18.
No. 1870. **Trading with the Enemy** (Specified Persons) (Amendment) (No. 12) Order, October 29.

[E.P. indicates that the Order is made under Emergency Powers.]

Draft and Provisional Rules and Orders.

Railway and Canal Commission Provisional Rules, October 25, 1940.

House of Commons Papers (Session 1939/40).

163. **Emergency Powers (Defence) Act, 1939.** Report by the Secretary of State as to the action taken under Regulation 18B of the Defence (General) Regulations, 1939, during the period August 1 to 31, 1940.
171. Emergency Powers (Defence) Act, 1939. Report by the Secretary of State as to the action taken under Regulation 18B of the Defence (General) Regulations, 1939, during the period September 1 to 30.

Copies of the above S.R. & O.'s, etc., can be obtained through The Solicitors' Law Stationery Society, Ltd., 22, Chancery Lane, London, W.C.2, and Branches.

Legal Notes and News.

Professional Announcements.

(2s. per line.)

Messrs. Johnson, Jecks & Colclough having been bombed out of their offices at 24, Austin Friars, have taken temporarily a suite of offices at Ethelburga House, 91/3, Bishopsgate, E.C.2, where the business will be carried on for the time being. They hope it may be possible for them to return to the site of their old offices in Austin Friars at some future time.

Messrs. Biddle, Thorne, Welsford & Gait, of 22, Aldermanbury, E.C.2, and Messrs. Reynolds, Miles, Barnes & Drake, of 70 Basinghall Street, E.C.2, announce that their practices have been amalgamated as from the 1st July last. They will, however, for the present continue to be carried on at the present addresses under the existing styles. Messrs. Reynolds, Miles, Barnes & Drake will shortly move from 70, Basinghall Street, E.C.2, to 22, Aldermanbury, E.C.2, and notice of this will be given in due course. In consequence of the removal of the Principal Probate Registry and the Estate Duty Office from London, a branch office of the amalgamated firms has been opened at "Brabbyns," St. Seiriols Road, Llandudno.

Notes.

The directors of the Legal and General Assurance Society, Ltd., have declared an interim dividend for the year 1940 at the same rate as for the previous year, namely 1s. per share, less income tax, payable on the 1st January, 1941. The transfer book and share registers will be closed from the 14th to the 31st December, 1940, inclusive.

Court Papers.

SUPREME COURT OF JUDICATURE.

MICHAELMAS SITTINGS, 1940.

ROTA OF REGISTRARS IN ATTENDANCE ON

Date.	Emergency Rota.	Appeal Court No. I.	Mr. Justice Farwell.
	Mr.	Mr.	Mr.
Nov. 11	Andrews	More	Ritchie
,, 12	Jones	Blaker	More
,, 13	Ritchie	Andrews	Blaker
,, 14	More	Jones	Andrews
,, 15	Blaker	Ritchie	Jones
,, 16	Andrews	More	Ritchie

	Group A.		Group B.	
Date.	Mr. Justice Bennett. Witness. Mr.	Mr. Justice Simonds. Non-Witness. Mr.	Mr. Justice Crossman. Witness. Mr.	Mr. Justice Morton. Non-Witness. Mr.
Nov. 11	Ritchie	Jones	Andrews	Blaker
,, 12	More	Ritchie	Jones	Andrews
,, 13	Blaker	More	Ritchie	Jones
,, 14	Andrews	Blaker	More	Ritchie
,, 15	Jones	Andrews	Blaker	More
,, 16	Ritchie	Jones	Andrews	Blaker

Stock Exchange Prices of certain Trustee Securities.

Bank Rate (26th October, 1939) 2%. Next London Stock Exchange Settlement, Thursday, 21st November, 1940.

	Div. Months.	Middle Price 6 Nov. 1940.	Flat Interest Yield. £ s. d.	‡ Approximate Yield with redemption. £ s. d.
ENGLISH GOVERNMENT SECURITIES.				
Consols 4% 1957 or after	FA	111	3 12 1	3 2 3
Consols 2½%	JAJO	76	3 5 9	—
War Loan 3½% 1955–59	AO	101	2 19 5	2 18 2
War Loan 3½% 1952 or after	JD	101⅜	3 8 10	3 6 6
Funding 4% Loan 1960–90	MN	112¼	3 11 3	3 2 8
Funding 3½% Loan 1959–69	AO	98½	3 0 11	3 1 7
Funding 2¾% Loan 1952–57	JD	99	2 15 7	2 16 8
Funding 2½% Loan 1956–61	AO	92	2 14 4	3 0 9
Victory 4% Loan Average life 21 years	MS	111	3 12 1	3 5 4
Conversion 5% Loan 1944–64	MN	107⅜	4 12 10	2 12 1
Conversion 3½% Loan 1961 or after	AO	102	3 8 8	3 7 2
Conversion 3½% Loan 1948–53	MS	102½	2 18 6	2 12 1
Conversion 2½% Loan 1944–49	AO	99½	2 10 3	2 11 5
National Defence Loan 3½% 1954–58	JJ	102	2 18 10	2 16 7
Local Loans 3% Stock 1912 or after	JAJO	88	3 8 2	—
Bank Stock	AO	331	3 12 6	—
Guaranteed 3% Stock (Irish Land Acts) 1939 or after	JJ	89	3 7 5	—
India 4½% 1950–55	MN	107½	4 3 9	3 11 1
India 3½% 1931 or after	JAJO	92⅛	3 15 8	—
India 3% 1948 or after	JAJO	80	3 15 0	—
Sudan 4½% 1939–73 Average life 27 years	FA	110	4 1 10	3 18 0
Sudan 4% 1974 Red. in part after 1950	MN	105	3 16 2	3 14 7
Tanganyika 4% Guaranteed 1951–71	FA	109	3 13 5	2 19 0
Lon. Elec. T. F. Corpn. 2½% 1950–55	FA	93	2 13 9	3 1 9
COLONIAL SECURITIES.				
•Australia (Commonwealth) 4% 1955–70	JJ	104	3 16 11	3 12 11
Australia (Commonwealth) 3½% 1964–74	JJ	92	3 10 8	3 13 3
Australia (Commonwealth) 3% 1955–58	AO	90	3 6 8	3 15 6
•Canada 4% 1953–58	MS	111	3 12 1	2 19 3
New South Wales 3½% 1930–50	JJ	98	3 11 5	3 15 2
New Zealand 3% 1945	AO	95	3 3 2	4 5 1
Nigeria 4% 1963	AO	105	3 16 2	3 13 6
Queensland 3½% 1950–70	JJ	96	3 12 11	3 14 7
•South Africa 3½% 1953–73	JD	101¼xd	3 9 0	3 7 0
Victoria 3½% 1929–49	AO	98	3 11 5	3 15 4
CORPORATION STOCKS.				
Birmingham 3% 1947 or after	JJ	79½	3 15 6	—
Croydon 3% 1940–60	AO	91	3 5 11	3 12 10
Leeds 3½% 1958–62	JJ	94	3 9 2	3 13 1
Liverpool 3½% Redeemable by agreement with holders or by purchase	JAJO	93	3 15 3	—
London County 3% Consolidated Stock after 1920 at option of Corporation	MJSD	82xd	3 13 2	—
London County 3½% 1954–59	FA	103	3 8 0	3 4 7
Manchester 3% 1941 or after	FA	81½	3 13 7	—
Manchester 3% 1958–63	AO	91½	3 5 7	3 10 10
Metropolitan Consolidated 2½% 1920–49	MJSD	98xd	2 11 0	2 14 11
Met. Water Board 3% "A" 1963–2003	AO	82½	3 12 9	3 14 5
Do. do. 3% "B" 1934–2003	MS	86½	3 9 4	3 10 8
Do. do. 3% "E" 1953–73	JJ	89	3 7 5	3 11 8
Middlesex County Council 3% 1961–66	MS	91½	3 5 7	3 10 3
•Middlesex County Council 4½% 1950–70	MN	105	4 5 9	3 16 8
Nottingham 3% Irredeemable	MN	79½	3 15 6	—
Sheffield Corporation 3½% 1968	JJ	97⅜	3 11 10	3 12 11
ENGLISH RAILWAY DEBENTURE AND PREFERENCE STOCKS.				
Great Western Rly. 4% Debenture	JJ	104	3 16 11	—
Great Western Rly. 4½% Debenture	JJ	109½	4 2 2	—
Great Western Rly. 5% Debenture	JJ	113½	4 8 1	—
Great Western Rly. 5% Rent Charge	FA	113½	4 8 1	—
Great Western Rly. 5% Cons. Guaranteed	MA	105½	4 14 9	—
Great Western Rly. 5% Preference	MA	78	6 8 2	—

• Not available to Trustees over par.
‡ In the case of Stocks at a premium, the yield with redemption has been calculated at the earliest date; in the case of other Stocks, as at the latest date.